

Not Reported in S.W.3d, 2004 WL 1631394 (Tex.App.-Hous. (1 Dist.))  
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**MEMORANDUM OPINION**

Court of Appeals of Texas,  
Houston (1st Dist.).  
Homer H. JACKSON Jr., Appellant  
v.  
Michael W. HENDERSON, Appellee.

No. 01-03-00843-CV.  
July 22, 2004.

On Appeal from the 165th District Court, Harris  
County, Texas, Trial Court Cause No.2000-04190.  
**Jeffrey L. Gilman**, Gilman & Wirth, P.C., Hous-  
ton, TX, for Appellant.

**Jack J. Rawitscher**, Rawitscher & Carnahan, Hous-  
ton, TX, for Appellee.

Panel consists of Justices **NUCHIA**, **JENNINGS**,  
and **KEYES**.

**MEMORANDUM OPINION**

**TERRY JENNINGS**, Justice.

\*1 Appellant, Homer H. Jackson Jr. (Jackson), challenges the trial court's judgment, rendered following a bench trial, in favor of appellee, Michael W. Henderson (Henderson), in Henderson's suit for breach of contract, fraudulent inducement, and negligent misrepresentation. In six issues, Jackson contends that (1) Henderson had no viable cause of action against him, (2) the evidence was legally and factually insufficient to show that "Henderson suffered any loss caused by him," (3) the trial court erred in basing its damage award upon a "mere anticipated sale," (4) Henderson's contract and tort claims were barred by the applicable statutes of

limitations, (5) the evidence was legally and factually insufficient to support the trial court's finding that Jackson had committed fraud, and (6) the evidence was factually insufficient to support the trial court's damage award.

We reverse the judgment of the trial court, and we render judgment that Henderson take nothing by way of his suit.

**Facts**

On August 6, 1974, 22 venturers executed a joint venture agreement (the original venture agreement) creating Landmark 80 Venture (Landmark Venture), a Texas joint venture, for the purpose of acquiring, developing, and then selling an 80-acre tract of land located in Fort Bend County. The original venture agreement provided that Landmark Venture would exist for a period of 25 years and would expire on April 30, 1999. It also provided that Landmark Equities Investment and Management Corporation (Landmark Corp.) had "the exclusive right to sell, lease or otherwise dispose of all or any part of the [tract]" and that, upon the sale of the tract, Landmark Venture would pay Landmark Corp. 10 percent of any net profit realized from the sale and six percent of the purchase price as a real estate commission.

On October 11, 1974, Jackson, as president of Landmark Corp., assigned to Henderson a "7.625" percent interest in Landmark Corp.'s right to receive 10 percent of any net profit realized from the sale of the tract.

On February 22, 1982, Landmark Corp. forfeited its corporate charter by failing to pay past due franchise taxes. Thereafter, on June 1, 1982, Jackson, acting individually and on behalf of Landmark Corp., assigned to Henderson a 20 percent interest both in Landmark Corp.'s right to receive 10 percent of any net profit realized from the sale of the tract and its right to receive six percent of the purchase price as a real estate commission. In con-

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sideration thereof, Henderson assigned all of the stock that he owned in Landmark Corp. to Jackson. The written assignment agreement provided that Jackson had a duty to notify Henderson of any “event of default, bankruptcy, or other legal proceedings, actions or events” that would jeopardize Landmark Corp.’s “interest or rights with respect to” Landmark Venture. At the time of the assignment, Henderson, although an officer of Landmark Corp., did not know that the corporation had forfeited its charter.

\*2 On April 20, 1999, as Landmark Venture was about to expire, the venturers executed an amendment to and ratification of the original venture agreement (the new venture agreement). The new venture agreement provided that Landmark Venture would continue to exist for another 10 years. Moreover, it contained a provision that specifically “delete[d] Paragraphs 2.002c and 2.002d,” which were the provisions of the original venture agreement providing that Landmark Corp. had “the exclusive right to sell, lease or otherwise dispose of” the tract and that Landmark Venture, upon the sale of the tract, would pay Landmark Corp. 10 percent of any net profit realized from the sale and six percent of the purchase price as a real estate commission. Additionally, the new venture agreement contained a provision specifying that the original venture agreement “as hereby amended is hereby ratified and reaffirmed.”

On January 31, 2000, in anticipation of a sale of the tract, Henderson filed suit against Landmark Venture, the individual venturers, Landmark Corp., and Jackson seeking a declaration that Henderson was entitled to receive his assigned compensation upon the sale’s occurrence. Thereafter, on June 29, 2001, Henderson amended his pleadings to allege specific claims against Jackson arising out of the June 1, 1982 assignment, seeking “to recover from Jackson the amount [Henderson] would have been owed by the Venture if the June 1, 1982, assignment was enforceable against the Venture.” Specifically, Henderson alleged that Jackson (1) had

fraudulently induced him to enter into the assignment because Jackson had failed to disclose that Landmark Corp. had forfeited its charter, (2) engaged in negligent misrepresentation because Jackson had failed to disclose that Landmark Corp. had forfeited its charter, and (3) breached a contractual duty to him because Jackson had failed to notify him, following the assignment, that Landmark Corp. had forfeited its charter. Henderson subsequently settled with Landmark Venture and the individual venturers and non-suited them from the case. However, Henderson did not settle with Jackson, and the case proceeded to trial.<sup>FN1</sup>

FN1. At the time of trial, the tract was under a contract for sale.

Following trial, the trial court rendered judgment in favor of Henderson and awarded him \$12,042.50 in damages and \$4,250 in attorney’s fees. Moreover, in its findings of fact and conclusions of law, the trial court found that (1) Jackson fraudulently induced Henderson to enter into the assignment on June 1, 1982 because Jackson knew that Landmark Corp. had forfeited its charter and he had failed to disclose that fact to Henderson, (2) Jackson “breached the contract he entered into on June 1, 1982,” and (3) because of Jackson’s breach of contract and fraudulent inducement, Henderson had suffered actual damages in the amount of \$12,042.50.<sup>FN2</sup>

FN2. The trial court made no findings in regard to Henderson’s claim for negligent misrepresentation.

#### Fraudulent Inducement

In his fifth issue, Jackson argues that the evidence was legally and factually insufficient to support the trial court’s finding that he fraudulently induced Henderson to enter into the June 1, 1982 assignment. Specifically, Jackson asserts that “no evidence was offered to show that [he] knew the charter had been forfeited” at the time of the assignment. Jackson further asserts that, although evidence of silence may constitute fraud, “his si-

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lence [did] not rise to the level of actionable conduct.”

\*3 In its findings of fact and conclusions of law, the trial court found, in part, as follows:

5. ... that on June 1, 1982, when [Jackson] entered into the [assignment] ... he knew that the charter of [Landmark Corp.] had been forfeited, and he failed to advise [Henderson] that the charter of [Landmark Corp.] had been forfeited.

....

7. ... that because [of] Jackson's fraudulent inducement and fail[ure] to disclose that the charter of [Landmark Corp.] had been forfeited, [Henderson] has been damaged.

In an appeal of a judgment rendered after a bench trial, the trial court's findings of fact have the same weight as a jury's verdict, and we review the legal and factual sufficiency of the evidence used to support them, just as we would review a jury's findings. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex.1994); *In re K.R.P.*, 80 S.W.3d 669, 673 (Tex.App.-Houston [1st Dist.] 2002, pet. denied). When challenged, a trial court's findings of fact are not conclusive if, as in the present case, there is a complete reporter's record. *In re K.R.P.*, 80 S.W.3d at 673. Our review of a legal sufficiency point requires us to consider only the evidence and inferences that tend to support a finding, disregarding all evidence and inferences to the contrary. *Vannerson v. Vannerson*, 857 S.W.2d 659, 666 (Tex.App.-Houston [1st Dist.] 1993, writ denied). If there is any evidence of probative force to support the finding, *i.e.*, more than a mere scintilla, we will overrule the issue. *Id.* In our review of the factual sufficiency of the evidence, we must consider and weigh all of the evidence, and we will set aside a verdict only if the evidence is so weak, or if the finding is so against the great weight and preponderance of the evidence, that it is clearly wrong and unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex.1986).

A party claiming fraudulent inducement must prove (1) a material misrepresentation, (2) which was false, (3) which was either known to be false when made or was asserted without knowledge of its truth, (4) which was intended to be acted upon, (5) which was relied upon, and (6) which caused injury. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex.1998). Silence is equivalent to a false representation where circumstances impose a duty to speak and one deliberately remains silent. *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex.1986). A duty to disclose may arise where (1) there is a fiduciary relationship, (2) one voluntarily discloses partial information, but fails to disclose the whole truth, (3) one makes a representation and fails to disclose new information that makes the earlier representation misleading or untrue, or (4) one makes a partial disclosure and conveys a false impression. *Hoggett v. Brown*, 971 S.W.2d 472, 487 (Tex.App.-Houston [14th Dist.] 1997, pet. denied).

In regard to the legal sufficiency of the evidence to support the trial court's finding that Jackson fraudulently induced Henderson to enter into the assignment, we can find nothing in the record to indicate that Jackson deliberately remained silent about the fact that Landmark Corp. had forfeited its charter. Although Jackson admitted that, as President, he was “obligated” to ensure that Landmark Corp. paid its franchise taxes, he specifically testified that, at the time of the assignment, he did not know that Landmark Corp. had forfeited its charter. Moreover, there is no evidence in the record that, at the time of the assignment, Jackson knew that Henderson did not know that Landmark Corp. had forfeited its charter. If Jackson was unaware of the fact that Henderson did not know that Landmark Corp. had forfeited its charter, then Jackson could not have deliberately remained silent. Accordingly, we hold that the evidence was legally insufficient to support the trial court's finding that Jackson fraudulently induced Henderson to enter into the assignment.

\*4 We sustain Jackson's fifth issue.

#### Causation

In his second issue, Jackson contends that the evidence was legally and factually insufficient to show that “Henderson suffered any loss caused by him.” We construe Jackson's contention to be a challenge to the trial court's finding that, because of Jackson's breach of contract and fraudulent inducement, Henderson suffered actual damages. Having concluded that the evidence was legally insufficient to support the trial court's finding that Jackson fraudulently induced Henderson to enter into the assignment, we address only whether the evidence was legally and factually sufficient to support the trial court's finding that Jackson's alleged breach of contract caused Henderson to suffer actual damages.

In this regard, the trial court found, in part, as follows:

8. ... that [Jackson] breached the contract he entered into on June 1, 1982 with [Henderson].
9. ... that [Henderson] has been damaged in the amount of \$12,042.50 in actual damages because of Jackson's breach of contract and fraudulent inducement.
10. The damages were determined by calculating an amount equal to .475% of the ‘net profit’ as determined under the [Landmark Corp.] Joint Venture Agreement, dated August 6, 1974, plus an amount equal to .6% of the projected sales price of the land owned by [Landmark Venture].

Jackson asserts that the trial court awarded Henderson the amount “that he would have been owed under the assignment of June 1, 1982, if the assignment had been valid.” Jackson further asserts that, by awarding this amount, the trial court found that, “as a result of [Jackson's] actions, ... Henderson lost the assigned compensation he would otherwise have received.” Jackson argues that the evidence, however, showed that, even if the assignment

had been valid, Henderson would not have been entitled to receive any assigned compensation from Landmark Corp. because (1) Landmark Corp. failed to sell the tract of land “during the 25-year term of the [original venture] agreement under which the commissions were payable” and (2) the venturers, in the new venture agreement, specifically deleted the provisions of the original venture agreement assigning Landmark Corp. 10 percent of any net profit realized from the sale of the tract and six percent of the purchase price as a real estate commission. Jackson concludes, thus, that there was no evidence that he had caused Henderson to lose any assigned compensation from Landmark Corp. based on the June 1, 1982 assignment.

In response to Jackson's argument, Henderson asserts that he could not collect any assigned compensation from Landmark Corp. because “the assignment was made after the Landmark [Corp.] charter was forfeited.” Henderson further asserts that “the forfeiture was caused by Jackson's failure to meet his obligation to see that the franchise taxes of Landmark were paid.” Henderson concludes that, if Landmark Corp. had been in “good standing,” the contract between Landmark Venture and Landmark Corp. would have been enforceable because Landmark Venture had “an obligation to include [in the new venture agreement] the terms and conditions of the 1974 joint venture agreement.”

\*5 In a cause of action for breach of contract, a plaintiff can recover actual damages that are the natural, probable, and foreseeable consequence of the defendant's conduct. *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 687 (Tex.1981). However, if a plaintiff fails to establish a causal connection between an alleged breach and any alleged damages resulting therefrom, he may not recover. See *Delaney v. Davis*, 81 S.W.3d 445, 449 (Tex. App.-Houston [14th Dist.] 2002, no pet.).

In regard to the legal sufficiency of the evidence to support the trial court's finding that Jackson's alleged breach of contract caused Henderson to suffer actual damages, we can find nothing in the

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record to indicate that Jackson's failure to notify Henderson that Landmark Corp. had forfeited its charter caused Henderson to suffer damages. Instead, assuming that Jackson had notified Henderson and that the assignment had been valid, Henderson would still not have been entitled to receive the amount that Landmark Corp. had assigned to him because Landmark Corp., Henderson's assignor, was not entitled to receive any payments from Landmark Venture. An assignee obtains only the right, title, and interest of his assignor at the time of the assignment, and no more. *State Fidelity Mortgage Co. v. Varner*, 740 S.W.2d 477, 480 (Tex.App.-Houston [1st Dist.] 1987, writ denied). Here, Landmark Corp. was not entitled to receive anything from Landmark Venture because (1) Landmark Corp. did not sell the tract of land during the 25-year period when the original venture agreement was operative and (2) the venturers, in the new venture agreement, specifically deleted the paragraph of the original venture agreement providing that Landmark Corp. had "the exclusive right to sell, lease or otherwise dispose of" the tract and that Landmark Venture, upon the sale of the tract, would pay Landmark Corp. 10 percent of any net profit realized from the sale and six percent of the purchase price as a real estate commission. Although Henderson asserts that the venturers had "an obligation to include the terms and conditions of the 1974 joint venture agreement" in the new venture agreement, there is no evidence in the record that Jackson played any role in the venturers' decision to delete the compensation provisions from the new venture agreement. Therefore, Jackson cannot be held liable for the venturers' decision.

Accordingly, because there was no evidence of a causal connection between Jackson's alleged breach of contract and Henderson's alleged damages, we hold that the evidence was legally insufficient to support the trial court's finding that Jackson's alleged breach of contract caused Henderson to suffer actual damages.

We sustain Jackson's second issue.

### Conclusion

Having sustained Jackson's fifth and second issues, which dispose of the appeal, we need not reach Jackson's first, third, fourth, and sixth issues. Because the evidence was insufficient to support Henderson's fraudulent inducement claim and breach of contract claims, we reverse the judgment of the trial court, and we render judgment that Henderson take nothing by way of his suit.

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